IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 27, 2007 Session

JAMES G. THOMAS JR., brother and next of kin of KAREN G. THOMAS, deceased v. ELIZABETH OLDFIELD, M.D., ET AL.

Direct Appeal from the Circuit Court for Davidson County
No. 05C-3207 Walter C. Kurtz, Judge

No. M2006-02767-COA-R9-CV - Filed November 7, 2007

We granted this interlocutory appeal to determine whether the trial court properly ordered the defendants in this medical malpractice action to produce information regarding liability insurance coverage. We hold that the trial court erred because the liability insurance information sought by the plaintiff bears no connection to any claim or defense in the suit; is neither admissible nor reasonably calculated to lead to the discovery of admissible evidence; and is not sought for the preparation of the requesting party's case for trial. We accordingly reverse and remand.

Tenn. R. App. P. 9 Appeal by Permission; Judgment of the Circuit Court Reversed; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which HOLLY M. KIRBY, J. and PATRICIA J. COTTRELL, J., joined.

Darrell G. Townsend, Nashville, Tennessee, for the appellants, Charles V. Love, M.D. and Emergency Coverage Corporation.

John B. Carlson and William Daniel Leader, Jr., Nashville, Tennessee, for the appellee, James G. Thomas, Jr.

OPINION

On October 18, 2005, James G. Thomas, Jr. (Mr. Thomas) filed a medical malpractice suit for the wrongful death of his sister, Karen Thomas (Ms. Thomas). Among the various defendants were appellants Charles V. Love, M.D. (Dr. Love) and Emergency Coverage Corporation, Inc. (ECC). In the complaint, Mr. Thomas averred that Dr. Love, an emergency room physician at Crockett Hospital, mis-diagnosed Ms. Thomas's condition. He also asserted that ECC, with whom the hospital contracted for the staffing of its physicians and other personnel, negligently failed to supervise, train, and monitor Dr. Love and another physician. The complaint also charged ECC with vicarious liability for its employees' negligence. Mr. Thomas sought a fifteen million dollar

($15,000,000) judgment. Dr. Love and ECC filed their answers, respectively, on February 1 and February 23, 2006.

In the course of pre-trial discovery, Mr. Thomas submitted the following interrogatory to both Dr. Love and ECC:

> Provide the name and address of all insurance companies or other entities who might be called upon to pay any damages, settlement or judgment in this case or who contracted to provide any type of liability insurance coverage that may apply to the claims asserted in this litigation and for each such insurance company, identify the nature of the insurance coverage, the applicable limits for each policy, and the source of the funds from which damages will be paid if such funds are not being provided by an insurance company.

He likewise submitted to each party the following request for production of documents:

> Produce any insurance policies and excess insurance policies providing or which could provide coverage for you with respect to the incident forming the basis of this suit and which could be responsible for payment in the event a judgment is entered against you.

Dr. Love and ECC objected to the requests. On August 2, 2006, Mr. Thomas filed a motion to compel discovery, to which Dr. Love and ECC responded in opposition on September 29, 2006. The trial court conducted a hearing on November 17, 2006, and granted Mr. Thomas's motion by order entered November 29, 2006. The court adopted the reasoning set forth in *Greene v. Nashville Otolaryngology Consultants*, one of its previous decisions, and attached a copy of it to the order. In that case, the trial court ruled that information regarding the defendant's insurance coverage was discoverable under Tennessee Rule of Civil Procedure 26 because it was relevant to the disposition of the case; the court relied upon the law of other jurisdictions and case law construing the earlier federal counterpart with substantially identical text.

The trial court subsequently entered an order granting Dr. Love's and ECC's motion for an interlocutory appeal, and this Court entered an order granting their application for permission to appeal on January 18, 2007.

Issue Presented and Standard of Review

Dr. Love and ECC present the following issue, as slightly restated, for appellate review:

> Whether, in civil litigation, information concerning defendants' liability insurance (e.g., the existence of such insurance coverage, the limits of liability under such coverage, the actual terms of the insurance policies which have been purchased by

the defendants) is discoverable by plaintiffs under the Tennessee Rules of Civil Procedure.

Although the parties agree upon the issue, they disagree about the appropriate standard by which this Court should review the order compelling the discovery of this information. Dr. Love and ECC contend that the issue presents a question of law that we review *de novo*, with no presumption of correctness for the trial court's determination. Mr. Thomas, on the other hand, asserts that we must review the trial court's discovery ruling under the abuse of discretion standard.

The case law of this State makes clear that "the course of pretrial discovery is, in large measure, left to the discretion of the trial judge and . . . the exercise of this discretion is based upon the broad parameters of the rules and the fundamental notion of fairness." *Vythoulkas v. Vanderbilt Univ. Hosp.*, 693 S.W.3d 350, 356 (Tenn. Ct. App. 1985).[1] Appellate courts will interfere with pre-trial rulings regarding discovery only where the trial court's decision manifests a clear abuse of discretion. *Benton v. Snyder*, 825 S.W.2d 409, 416 (Tenn. 1992). A trial court abuses its discretion when it applies an incorrect legal standard or applies the right standard incorrectly. *State v. Shirley*, 6 S.W.3d 243, 250 (Tenn. 1999).

Dr. Love and ECC assert that the trial court extended Rule 26.02 beyond its intended scope when it ordered the discovery of liability insurance information. In order to discern whether the trial court applied an incorrect legal standard by extending the rule beyond its intended scope, we must first interpret it. The interpretation of a Tennessee Rule of Civil Procedure is a question of law. *Lacy v. Cox*, 152 S.W.3d 480, 483 (Tenn. 2004). We review such questions *de novo* with no presumption of correctness. *Id.*; *S. Constructors, Inc. v. Loudon Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

Although not statutes, Tennessee's procedural rules are "'laws' of this state, in full force and effect, until such time as they are superseded by legislative enactment or inconsistent rules promulgated by [the Tennessee Supreme] Court and adopted by the General Assembly." *Tenn. Dep't of Human Servs. v. Vaughn*, 595 S.W.2d 62, 63 (Tenn. 1980). This Court must interpret procedural rules as we would statutes. *See Stempa v. Walgreen Co.*, 70 S.W.3d 39, 42 n.2 (Tenn. Ct. App. 2001). When interpreting statutes, this Court seeks to ascertain the intended scope of the statute, neither extending nor restricting the scope intended by the legislature. *State v. Morrow*, 75 S.W.3d 919, 921 (Tenn. 2002). To determine the legislature's intent, we begin with the statutory text and focus on the natural and ordinary meaning of the language within the context of the entire statute.

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[1] Mr. Thomas liberally cites to this case on appeal. In that case, the middle section of this Court held that the Rules of Civil Procedure permitted the discovery of the identity of an opposing party's retained, non-testifying expert. *Vythoulkas*, 693 S.W.2d at 360. Noting that discovery is designed to help clarify and define the issues in the case, this Court concluded that a non-testifying medical expert's identity would aid counsel in trial preparation because the expert's identity, with nothing more, could link the opponent's case to a particular school of thought. *Id.* at 359. Although the General Assembly amended the discovery rules in 1987 to prohibit the discovery of this information, *see* Tenn. R. Civ. P. 26.02(4)(B), this case indeed provides a well-researched history of the development of discovery procedure in Tennessee. *Id.* at 353–56.

Calaway v. Schucker, 193 S.W.3d 509, 513 (Tenn. 2005). Courts must construe a statute reasonably, bearing in mind its objective, the harm it seeks to avoid, and the purposes it seeks to promote. *Voss v. Shelter Mut. Ins. Co.*, 958 S.W.2d 342, 345 (Tenn. Ct. App. 1997).

Analysis

Tennessee Rule of Civil Procedure 26.02 (1) sets forth the scope of discovery, in pertinent part, as follows:

> Parties may obtain discovery regarding any matter, not privileged, which is *relevant to the subject matter involved in the pending action*, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. *It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence*.

Tenn. R. Civ. P. 26.02(1) (emphasis added). Although the scope of discovery is broad, it is not unlimited. *Steinkerchner v. Provident Life & Acc. Ins. Co.*, No. 01A01-9901-CH-00039, 1999 WL 734545, *2 (Tenn. Ct. App. Sept. 22, 1999) (*no perm. app. filed*) (citing *Miller v. Doctor's General Hosp*., 76 F.R.D. 136, 139 (W.D. Okla.1977)). Rule 26.02(1) permitted Mr. Thomas to pursue the discovery of any non-privileged information relevant to the subject matter of his lawsuit against the defendants. The more focused issue presented, then, is whether the information sought by Mr. Thomas is properly within the scope of the "subject matter" of the pending law suit. A consideration of the following three points leads us to conclude that the requested information falls outside the purview of Tennessee Rule of Civil Procedure 26.02(1): the plain meaning of "subject matter;" the context of the term's use in the rule; and the context in which the legislature first enacted Rule 26.

"Subject Matter"

"Subject matter," as defined by Webster's Dictionary, means "matter presented for consideration in discussion, thought, or study." Webster's Ninth New Collegiate Dictionary 1174 (1986). Black's Law Dictionary provides the same definition, albeit with some modification for legal usage:

> [t]he issue presented for consideration; the thing in which a right or duty has been asserted; the thing in dispute.

Black's Law Dictionary 1466 (8th ed. 2004). As we interpret the term in the context of the rule, the plain meaning of "subject matter involved in the pending action" does not extend to matters

having no bearing on the preparation of the case for trial. In this case, the matter presented for the trial court's consideration was the potential negligence of Dr. Love and ECC and their possible liability for the death of Mr. Thomas's sister. We perceive the substance, or subject matter, of a particular case to be distinct from matters of economic strategy having no connection to that substance.[2] Indeed, where the information sought bears no connection to any claim or defense in the suit; is neither admissible nor reasonably calculated to lead to the discovery of admissible evidence; and is not sought for the preparation of the requesting party's case for trial, that information falls outside the scope of discovery as defined by Rule 26.02(1).

Context

Although "subject matter" is a broad, general term, the context in which it is employed limits its reach to information that assists in the preparation of the case for trial. By context, we mean two portions of the rule, both of which express its breadth of scope but simultaneously limit it in a determinative way. The first sentence clarifies through example what "subject matter" includes, extending it to information relevant to *any* claim or defense in the action, not just to the claim or defense of the party seeking discovery. *See* Tenn. R. Civ. P. 26.02(1). Equally notable is the second sentence, which establishes the connection between evidentiary standards and the scope of discovery: "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* This sentence serves two functions. First, it emphasizes that the scope of discovery is not coextensive with the standards for the admissibility of evidence; indeed, it is far broader. Second, it strongly suggests that a *proper* ground for objection is that the information sought is neither admissible at trial nor reasonably calculated to lead to the discovery of admissible evidence.

Mr. Thomas contends, however, that "subject matter" is broad enough to encompass inadmissible evidence not reasonably calculated to lead to the discovery of admissible evidence. The information he seeks through discovery falls within this category, as he neither asserts it is admissible[3], nor does he argue the insurance information could lead to the discovery of admissible evidence. He rejects the notion that the second sentence of the rule defines the outer boundaries of relevance for discovery. Relying upon case law from the Supreme Court of Utah, he asserts that evidentiary significance is only one of two bases of relevance established by Rule

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[2]"A person's liability in our law still remains the same whether or not he has liability insurance." *Barranco v. Jackson,* 690 S.W.2d 221, 227 (Tenn. 1985) (citation omitted), *overruled on other grounds by Broadwell v. Holmes*, 871 S.W.2d 471 (Tenn. 1994) .

[3]Rule 411 of the Tennessee Rules of Evidence provides that evidence pertaining to liability insurance is not admissible to show wrongful conduct or negligence. *See* Tenn. R. Evid. 411. Such evidence may be admissible if offered for other purposes such as establishing agency, ownership, or control, among other things. Tenn. R. Evid. 411. Mr. Thomas does not contend this information would be admissible at trial.

26.02(1). He argues that, consistent with the rule of construction set forth in Rule 1[4], the "subject matter" of the action also includes whatever will facilitate its just and speedy resolution, including anything tending to promote settlement.

We need not determine whether the second sentence of the rule expresses the outer limits of the scope of discovery. Rather than address the parameters of what is *sufficient* to show relevance under Rule 26, we need only address the lower threshold of what is *necessary*. In this case, Mr. Thomas fails to make the necessary showing under Rule 26.02(1) because he has articulated no connection between the liability insurance information and the preparation of his case for trial.

"Pre-Rules" Case Law

In the absence of binding case law[5] and instructive federal opinions on this point, we look to the Tennessee case law in existence at the time the legislature enacted the Tennessee Rules of Civil Procedure to resolve this dispute. Although Mr. Thomas and the trial court find value in the federal cases interpreting Federal Rule 26 before its 1970 amendment, we have a different perspective. First, some years after the adoption of the Tennessee Rules of Civil Procedure in 1970, the Tennessee Supreme Court entered an order that, in pertinent part, adopted changes to Rule 26 so it would conform substantially to its Federal Rules counterpart following the 1970 revisions. *See* Tenn. R. Civ. P. 26, advisory commission comment to 1979 amendment ("Rules 26 through 37, inclusive, relating to depositions and discovery, have been amended [in 1979] to conform substantially but not identically to Rules 26 through 37 . . . of the Federal Rules of Civil Procedure. . . . Subdivisions (3) and (4) of Rule 26.02 provide detailed rules in the heretofore uncharted areas of discovery of work product and expert testimony."). The 1970 amendment to the Federal Rules of Civil Procedure yielded an important addition to Rule 26 that did *not* appear in the 1979 amendment to the Tennessee counterpart:

> (2) Insurance Agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of

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[4]Rule 1 provides that "[t]hese rules shall be construed to secure the just, speedy, and inexpensive determination of every action." Tenn. R. Civ. P. 1.

[5]Mr. Thomas correctly asserts that there are no Tennessee appellate decisions addressing this issue, with the sole exception of an opinion filed, but later withdrawn, by this Court. Approximately one week prior to the filing of this Court's opinion in *Baker v. American Paper and Twine Co.*, the trial court entered an order incorporating a settlement agreement reached by the parties. Upon learning of these events after filing the opinion, we then withdrew it and dismissed the appeal. *Baker v. Am. Paper and Twine Co.*, No. M2000-01633-COA-RM-CV, 2000 WL 33681420 (Tenn. Ct. App. Aug. 16, 2000).

> disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

48 F.R.D. 487, 493–94 (1970). And, although Federal Rule of Civil Procedure 26 now mandates the disclosure of such information, *see* Fed. R. Civ. P. 26(a)(1)(D), Tennessee Rule of Civil Procedure 26.02 remains unchanged regarding this issue. Second, the Advisory Committee notes to the 1970 federal amendment confirms that the amendment was not a clarification of the scope of relevance, but instead a change in the law. *See* Fed. R. Civ. P. 26, advisory committee notes to 1970 amendment ("[T]he provision makes no change in existing law on discovery of indemnity agreements other than insurance agreements by persons carrying on an insurance business."); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 n.16 (1978) (noting also in the main text that the 1970 amendment was required to bring such information within the scope of discovery because it ordinarily could "[not] be considered, and would not lead to information that could be considered, by a court or jury in deciding any issues"). This characterization indicates that, prior to the 1970 amendment of the rule, a defendant's liability insurance coverage was not relevant to the subject matter of the pending action. Third, and finally, the parties acknowledge that federal courts were split on the scope of the pre-1970 Federal Rule of Civil Procedure 26. In short, we find this body of case law less than instructive in this matter.

The Tennessee case law in existence at the time of the rule's enactment suggests that the legislature never intended Rule 26 to extend beyond matters sought to assist counsel in trying the case. Rule 26.02 "codifies prior court decisions permitting the discovery of any relevant matter that is not privileged." *Vythoulkas v. Vanderbilt Univ. Hosp.*, 693 S.W.2d 350, 355 (Tenn. Ct. App. 1985). As noted by Mr. Thomas, these decisions interpreting the deposition statute[6] that preceded the 1970 enactment of the Tennessee Rules of Civil Procedure favor a liberal construction of its scope. *See Harrison v. Greeneville Ready-Mix, Inc.*, 417 S.W.2d 48, 52 (Tenn. 1967); *State ex rel. Pack v. W. Tenn. Distrib. Co.*, 430 S.W.2d 355, 357 (Tenn. Ct. App. 1968); *Se. Fleet Leasing, Inc. v. Gentry*, 416 S.W.2d 773, 777 (Tenn. Ct. App. 1966). Nonetheless, the information sought in the cited cases was relevant to the preparation of the

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[6]The Deposition Law of 1959 virtually mirrored the discovery provisions then in effect under the Federal Rules of Civil Procedure. *Vythoulkas*, 693 S.W.2d at 354. In particular, the deposition statute defined the scope of examination in the same manner as the first section of Rule 26.02(1).

> [T]he deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party . . . .

Deposition Law of 1959, 1959 Tenn. Pub. Acts 234, 235; *Harrison v. Greeneville Ready-Mix, Inc.,* 417 S.W.2d 48, 50 (Tenn. 1967)(setting forth the provisions of Tennessee Code Annotated Section 24-1204, the codification of the Deposition Law of 1959). In 1970, the General Assembly adopted the Tennessee Rules of Civil Procedure by joint resolution. 1970 Tenn. Pub. Acts 973, 973–74.

respective cases for trial.[7] *See, e.g., Greeneville Ready-Mix, Inc.*, 417 S.W.2d at 49 (discovery of employer's payroll and other corporate records in action under Fair Labor Standards Act); *Se. Fleet Leasing, Inc.*, 416 S.W.2d at 774–75 (discovery of the plaintiff's statement taken by insurance company immediately after subject accident). Indeed, the function of discovery as conveyed by these cases further legitimizes the distinction drawn here:

> The courts in modern times are encouraging the use of discovery and deposition because it operates with desirable flexibility under the discretionary control of the trial judge and this is the logical method of preventing surprise and permitting both the court and counsel to have an intelligent *grasp of the issues to be litigated and knowledge of the facts underlying them*.

Greeneville Ready-Mix, Inc., 417 S.W.2d at 52 (emphasis added). The spirit and purpose of the act was:

> to promote the ascertainment of truth by aiding a party in preparing for trial, to prevent surprise and insure as far as possible a trial on the merits, rather than upon fortuitous and unforeseen developments at the trial.

Se. Fleet Leasing, Inc., 416 S.W.2d at 776.

More recent case law illustrates that this spirit and purpose have remained the same under the Tennessee Rules of Civil Procedure. The intended function of pre-trial discovery is to "bring out the facts prior to trial, thereby eliminating surprise and enabling the parties to decide what is at issue." *Wright v. United Serv. Auto. Ass'n*, 789 S.W.2d 911, 915 (Tenn. Ct. App. 1990)(citing *Ingram v. Phillips*, 684 S.W.2d 954, 958 (Tenn. Ct. App. 1984); *Strickland v. Strickland*, 618 S.W.2d 496, 501 (Tenn. Ct. App. 1981)). In most cases, insurance liability coverage has nothing to do with bringing out the facts for trial, developing and clarifying the issues, or preventing surprise. Mr. Thomas identifies no such connection between the insurance coverage and this case; in fact, he relies instead upon its relevance to the likelihood of settlement and of recovering on a judgment.

Informed by the plain meaning of "subject matter of the pending action" and the spirit and purpose of the rule as originally enacted, we do not view the liability insurance coverage in this case as coming within its scope because the information bears no relation to the issues before the trial court. When the party seeking discovery has failed to state a connection between the liability insurance information and the preparation of its case for trial, and when none is

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[7] In the medical malpractice case of *Crowe v. Provost*, this Court held it was error for the trial court to order production of the doctor's professional liability insurance policy because, *inter alia*, it was not relevant to the issues in the law suit. *Crowe v. Provost*, 347 S.W.2d 645, 653 (Tenn. Ct. App. 1963). The trial court's order constituted harmless error because the jury was never informed of the policy's existence. *Id.* Although decided before the enactment of Rule 26, this case further supports our conclusion.

otherwise apparent, that information falls outside the scope of discovery. For the foregoing reasons, we reverse the trial court's order and remand the cause for further proceedings. Costs of this appeal are taxed to James G. Thomas, Jr., for which execution shall issue if necessary.

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DAVID R. FARMER, JUDGE